Supreme Court, U.S.
FILED
DEC - 6 2000
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No. 00-723

IN THE

Supreme Court of the United States

VERA PARKER-BIGBACK,

Petitioner,

v.

ST. LABRE INDIAN SCHOOL EDUCATIONAL ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF IN OPPOSITION

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LIST OF PARTIES

The Petitioner is Vera Parker-Bigback, a Northern Cheyenne person. Respondent is the St. Labre Indian School Educational Association, located in Ashland, Montana, near the Northern Cheyenne Reservation.

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OPINIONS BELOW

The Montana Supreme Court issued its Opinion on 8 August 2000. (Pet. App. 1). The District Court Judge issued his Opinion on 17 September 1998 (Pet. App. 20). That decision was appealed to the Montana Supreme Court on 11 November 1998.

STATEMENT OF JURISDICTION

The United States Supreme Court lacks jurisdiction under 28 U.S.C. § 1257. The Montana Supreme Court based its decision exclusively upon independent and adequate state law grounds, without deciding a Federal question. Accordingly, the United States Supreme Court should deny the Petition for Writ of Certiorari for lack of jurisdiction.

RELEVANT CONSTITUTIONAL AND STATE STATUTORY PROVISIONS

1. 28 U.S.C. § 1257(a) states:

> **State courts; certiorari** (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

2. The First Amendment to the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for the redress of grievances.

3. Article II, Section 5 of the Montana Constitution states:

Freedom of Religion. The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

4. Mont. Code Ann. § 49-2-303, states:

(1) It is an unlawful discriminatory practice for:

(a) an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of race, creed, religion, color or national origin or because of age, physical or mental disability, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental disability, marital status, or sex distinction . . .

STATEMENT OF THE CASE

St. Labre Indian School Educational Association ("St. Labre") is a non-profit Catholic institution which serves the Crow and Northern Cheyenne communities in Eastern Montana, espousing the teachings and beliefs of the Roman Catholic faith. As part of its activities, St. Labre operates a school and provides related services. Its programs and projects, as well as all policies, reflect Christian, Roman Catholic values and principles.

Vera Parker-Bigback ("Parker") was hired by St. Labre as a school teacher in 1981. During her employment at St. Labre,

she was married from 1974 to 1984 and remarried some time after 1993. In 1988, at the request of Father Dennis Druggan, her job changed to include duties as an Employee Assistant and School Counselor. As part of her employment agreement, Parker signed a contract setting forth her employment conditions, salary and benefits. The contract provides:

> *THE TEACHER AGREES*:
>
> 1. To perform such duties in the grades, fields or other duties assigned by the principal and to perform the duties involved in said assignments.
>
> * * *
>
> 4. To conform to and abide by all of the moral and religious teachings and beliefs of the Roman Catholic Church and not to engage in any personal conduct or lifestyle which would be at variance with or contrary to the policies of the School and the Diocese of Great Falls-Billings or the moral and religious teachings of the Roman Catholic Church.

In addition to her contract, Parker was also subject to the policies and provisions found in the St. Labre Employee Manual ("Manual"). The Manual specifically advised Parker that St. Labre "administers the work of Catholic education and social services." The Manual also advocates affirmative action in the workplace, encouraging St. Labre to comply with Federal and State law regarding discrimination in employment. However, that affirmative action statement does not waive St. Labre's constitutionally protected rights. St. Labre provided Parker with a copy of the Manual and she was fully aware of St. Labre's policies and procedures during her employment with St. Labre.

While working at St. Labre, Parker continued her education, as she was not yet a certified chemical dependency counselor or licensed professional counselor. St. Labre assisted with and paid for much of that education. Before Parker completed her education, Father Druggan transferred from St. Labre, and Father

Emmett Hoffmann became her supervisor. Father Hoffmann's vision for St. Labre differed somewhat from that of Father Druggan. Father Hoffmann did not feel that Parker's position was necessary to St. Labre. Father Hoffmann also felt that Parker's lifestyle did not reflect, nor conform to, Roman Catholic values and principles. He advised Parker of these matters.

The St. Labre Board of Directors was also considering a change in structure by forming a personnel department. Parker approached Father Hoffmann about the possibility of St. Labre further funding her schooling. Father Hoffmann discussed the scenario with Parker on 15 May 1992. He understood that Parker would complete her education and the required number of hours of counseling by the end of St. Labre's fiscal year, 31 January 1993. At that time, Parker's position would be eliminated and she would go into private practice.

The St. Labre Board of Directors approved the budget which eliminated Parker's position and established a personnel director. St. Labre provided Parker with further funding to complete her education. Effective 31 January 1993, Parker's job position at St. Labre was eliminated. After the elimination of her position, Parker did not file a grievance with St. Labre, as required by the Manual. Instead, she filed a complaint with the Montana Human Rights Commission on 9 March 1993, alleging discrimination based upon marital status and retaliation.

On 21 April 1995, Parker instituted suit after she received a right to sue letter from the Human Rights Commission. On 15 May 1995, the United States Equal Employment Opportunity Commission issued its determination that the evidence gathered during its investigation did not establish a Title VII violation. Discovery ensued. St. Labre filed for summary judgment. On 17 September 1998, the District Court granted St. Labre's Motion for Summary Judgment. (Pet. App. 20). Parker appealed. On 8 August 2000, the Montana Supreme Court entered its decision in favor of St. Labre on Montana state law grounds (Pet. App. 1).

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari should be denied because: (1) the United States Supreme Court lacks jurisdiction as the underlying Montana Supreme Court decision is based exclusively upon independent and adequate Montana state law grounds and determination of a Federal question will not affect that decision; and (2) civil court inquiry into internal ecclesiastical matters is prohibited by the free exercise of religion clauses of the United States and Montana Constitutions.

1. The Montana Supreme Court Decision is Based Exclusively on Independent and Adequate Montana State Law Grounds.

The Montana Supreme Court relied exclusively on state law grounds in support of its 8 August 2000 decision. (Pet. App. 1). Parker filed a discrimination claim under Montana state law based on allegations of marital status and retaliation. Mont. Code Ann. § 49-2-303, provides:

> (1) It is an unlawful discriminatory practice for:
>
> > (a) an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of race, creed, religion, color or national origin or because of age, physical or mental disability, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental disability, marital status, or sex distinction . . .

In Montana, in order to allege a *prima facie* case of discrimination under Mont. Code Ann. § 49-2-303, and survive a motion for summary judgment, the complaint must allege specific conduct forming the basis of the discrimination.

See Heiat v. Eastern Montana College, 275 Mont. 322, 912 P.2d 787, 793 (1996).

Based upon the record before it, the Montana Supreme Court found that Parker failed to allege any conduct on the part of St. Labre which would support her discrimination claim. Rather, the Montana Supreme Court properly found that Parker was terminated due to her failure to conform her conduct to standards she previously agreed to in writing.

Parker's employment contract obligated her to conduct herself in a manner befitting the Catholic religion and not to engage in any personal conduct or lifestyle which would be at variance with or contrary to the policies of the School and the Diocese of Great Falls-Billings or the moral and religious teachings of the Roman Catholic Church. Specifically, her contract provided:

> *THE TEACHER AGREES*:
>
> 1. To perform such duties in the grades, fields or other duties assigned by the principal and to perform the duties involved in said assignments.
>
> * * *
>
> 4. To conform to and abide by all of the moral and religious teachings and beliefs of the Roman Catholic Church and not to engage in any personal conduct or lifestyle which would be at variance with or contrary to the policies of the School and the Diocese of Great Falls-Billings or the moral and religious teachings of the Roman Catholic Church.

During her employment with St. Labre, Parker admitted that she cohabitated with someone of the opposite sex without the benefit of marriage. She also admitted that she failed to conform her conduct to Catholic moral values, even after she agreed in writing to do so. As the Montana Supreme Court found, Parker was not terminated due to her marital status or

retaliation, as she alleges. Rather, St. Labre terminated Parker when they eliminated her position, as a result of a sound business decision to create a personnel director, and based upon her conduct. As Employee Assistant and School Counselor, Parker was directly involved in the day to day spiritual and lay education of St. Labre students and employees. Whether married or single, Roman Catholic moral and religious teachings do not support cohabitation with someone of the opposite sex to whom one is not married. Accordingly, the Montana Supreme Court correctly found that Parker failed to conform her conduct to the agreed upon contractual terms.

The Montana Supreme Court did not reach any determination of a Federal question in its analysis. Rather, the Court held that Montana law precluded the lawsuit:

> No authority has been offered to suggest that either Article II, Section 4 of the Montana Constitution, which prohibits discrimination against people based on various characteristics or beliefs, or § 49-2-303, MCA, prohibit discrimination based on a person's conduct. Nor has any authority been offered to persuade us that Bigback's conduct at issue involved a right of such a high order that it would overcome the school's right to freely exercise its religion through its employment practices as guaranteed by the First Amendment to the United States Constitution and our decision in *Miller v. Catholic Diocese of Great Falls, Billings,* (1986), 224 Mont. 113, 728 P.2d 794.
>
> Therefore, based on Bigback's allegations as demonstrated by her deposition testimony, we see no need to balance those religious rights upon which the District Court based its decision against Bigback's right to be free from discrimination based on marital status or her gender. *This case is not about marital status or gender. It is about conduct which*

> *Bigback agreed to avoid when she signed her employment agreement with St. Labre School.* Even if she was terminated for the reason alleged, we conclude that her rights to be free from discrimination was not involved. (Emphasis added.) (Pet. App. 7.)

Parker asserts jurisdiction in this matter pursuant to 28 U.S.C. § 1257, claiming that the Montana Supreme Court decided a Federal question in a way that conflicts with the United States Constitution. (Pet. 1.) Such is not the case. In rendering its 8 August 2000 decision, the Montana Supreme Court relied exclusively on independent and adequate Montana state law grounds. Determination of a Federal question does not, and will not, affect the Montana Supreme Court's decision.

28 U.S.C. § 1257 grants the United States Supreme Court jurisdiction to directly review final judgments or decrees of the highest court of a State, under certain circumstances. The Petitioner bears the burden of establishing that the United States Supreme Court possesses such jurisdiction. *Michigan v. Long*, 463 U.S. 1032, 1042, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983). Generally, this Court does not possess jurisdiction to review judgments of state courts that rest on independent and adequate state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125, 89 L. Ed. 789, 65 S. Ct. 459 (1945); *Murdock v. Memphis*, 87 U.S. 590, 20 Wall. 590, 636, 22 L. Ed. 429 (1874); *Enterprise Irrig. Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164, 37 S. Ct. 318, 320, 61 L. Ed. 644 (1917); *Fox Film Corp. v. Muller*, 296 U.S. 207, 80 L. Ed. 158, 56 S. Ct. 183 (1935).

In *Herb v. Pitcairn*, the Court stated:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court

> after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion. *Id.* at 126. *See also*: *Michigan v. Long*, 463 U.S. at 1042 and *Coleman v. Thompson*, 501 U.S. 722, 730, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991).

Nor does the Court possess jurisdiction to review questions of federal law decided by a state court if the decision of that state court rests on a state law ground that is independent of the federal question and adequate to support the judgment, regardless of whether the state law ground is substantive or procedural. *Fox Film Corp. v. Muller,* 296 U.S. at 210 and *Klinger v. Missouri,* 80 U.S. 257, 20 L. Ed. 635 (1872).

In *Michigan v. Long*, the Court determined that when the state court decision contains a "plain statement" that the state court decision rests upon adequate and independent state grounds, this Court should not address federal issues before the state court. The Montana Supreme Court explicitly stated that its decision was not based upon federal grounds, even though the District Court decided the summary judgment motion, in part, on federal grounds. (Pet. App. 1).

Parker contends that the Montana Supreme Court decided a Federal question. That is not so. Existence of an undecided federal question is not relevant in the instant case. Even if a federal question exists, because the Montana Supreme Court disposed of the case on independent state law grounds before reaching a decision on the Federal question, jurisdiction does not exist. *Keene v. Clark,* 35 U.S. 291, 9 L. Ed. 429 (1836); *Basse v. Brownsville,* 154 U.S. Appx. 610, 22 L. Ed. 420, 14 S. Ct. 1195 (1875); *Crossley v. New Orleans,* 108 U.S. 105, 27 L. Ed. 667, 2 S. Ct. 300 (1883).

Accordingly, the Court does not have the power to review this decision, as sufficient state law reasons exist to support the judgment. Resolution on an independent federal ground could

not affect the judgment, but rather, would be only advisory in nature. *Coleman v. Thompson*, 501 U.S. at 730 and *Herb v. Pitcairn*, 324 U.S. at 125-126.

Parker's contract required her *not* to engage in any personal conduct or lifestyle which would be at variance with the moral and religious teachings of the Roman Catholic Church. She admits that she violated the contract. Parker cannot establish a *prima facie* case under the Montana Human Rights Act. Mont. Code Ann. § 49-2-303. In Montana an employer is entitled to make decisions which serve its own legitimate business interests, including engaging in the reduction of work force or elimination of job positions. *Gates v. Life of Montana*, 196 Mont. 178, 184, 638 P.2d 1063, 1066-67 (1982), quoting *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1256 (Mass. 1977); *see also Heltborg v. Modern Machinery*, 244 Mont. 24, 795 P.2d 954 (1990). Therefore, termination was an appropriate remedy.

Based upon the record before it, the Montana Supreme Court found that under Montana law, Parker failed to allege any conduct on the part of St. Labre which would support her discrimination claim based upon marital status, gender or retaliation. Rather, Parker was properly terminated under the Montana statute based upon her conduct. The Montana Supreme Court did not reach a decision on a Federal question. Sufficient State law grounds exist for the decision. Accordingly, the United States Supreme Court does not possess jurisdiction under 28 U.S.C. § 1257, and the Petition for Writ of Certiorari should be denied.

2. The Free Exercise of Religion Clauses of The United States and Montana Constitutions Prohibit a Writ of Certiorari.

Even if this Court otherwise had jurisdiction to decide this case, the United State and Montana Constitutions prohibit the granting of a Writ of Certiorari. Over a century ago, the United States Supreme Court mandated that civil courts not delve

into matters involving the inner ecclesiastical affairs of the church. *Watson v. Jones,* 80 U.S. 679, 733, 20 L. Ed. 666 (1872). Both the First Amendment of the United States Constitution and Article II, Section 5 of the Montana Constitution provide a blanket prohibition against civil courts entangling themselves in matters of church discipline, doctrine and practice. Article I states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . *U.S. Const. Amend. I.*

Similarly, Article II, Section 5 of the Montana Constitution provides:

> *Freedom of Religion.* The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. *Article II, Section 5, Mont. Const.*

Since the *Watson* decision, the United States Supreme Court has consistently held that civil courts cannot adjudicate matters which involve church policy and administration, or religious doctrine and practice. *See, e.g., NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 501-502, 59 L. Ed. 2d 533, 99 S. Ct. 1313 (1979); *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 708-09, 49 L. Ed. 2d 151, 96 S. Ct. 2372 (1976); *Lemon v. Kurtzman,* 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971); *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 114-16, 97 L. Ed. 120, 73 S. Ct. 143 (1952); and *Gonzalez v. Roman Catholic Archbishop,* 280 U.S. 1, 74 L. Ed. 131, 50 S. Ct. 5 (1929).

In *Wisconsin v. Yoder,* 406 U.S. 205, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972), the Court stated:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can over balance legitimate claims to the free exercise of religion. *Yoder*, 406 U.S. at 215.

The Montana Supreme Court has followed *Yoder* and its progeny, adhering to a policy that the constitutional guarantee of free exercise of religion shields from court review the conduct of religious entities to the extent such conduct is inextricably intertwined with the mission and teachings of the particular church. *Miller v. Diocese of Great Falls,* 224 Mont. 113, 118, 728 P.2d 794, 797 (1986). The Montana Supreme Court held that even to inquire into the validity of the claims would violate the free exercise of religion clauses of the United States and Montana Constitutions, since it would necessarily involve internal ecclesiastical matters. *Id.*

Parker cites *Davis v. Church of L.D.S,* 258 Mont. 286, 852 P.2d 640 (1993), in support of her claim. The *Davis* case is clearly distinguishable. *Davis* was originally a slip and fall case, wherein Davis was allowed to proceed against the church on the tort claim for negligence in its maintenance of the church premises. She later claimed negligent misrepresentation, fraud and intentional infliction of emotional distress in the handling of her claim. Davis alleged that the church threatened her with excommunication and denied her a good standing report (Temple Recommend) and church work (Church calling) in an effort to dissuade her personal injury claims against the church. *Davis,* 852 P.2d at 643. The Montana Supreme Court affirmed an order *in limine* excluding the evidence regarding the excommunication threats and the denials of Temple Recommend and Church calling. The Court concluded that it would be "impossible to evaluate the matter of the Temple Recommend or Church callings . . . without an inquiry into . . . the Mormon religion." *Id.* at 647. Citing United States Supreme Court precedent as establishing a "hands -off policy when courts are asked to review such matters," the Court concluded that "evidence of threats of excommunication would directly involve the Court in an analysis of religious beliefs and practices." Accordingly, such evidence was inadmissible. *Id.* at 649.

Parker was expected to conduct herself in a manner befitting the Catholic religion. She admits that she was living with and having a relationship without the benefit of marriage. Such a living arrangement is clearly against teachings of the Roman Catholic religion and is strictly prohibited. Therefore, any discipline taken against Parker for violating Catholic tenants, even the termination of her employment, is so intertwined with religious principles "that a court cannot properly make the determination requested here without interfering with a legitimate claim to the free exercise of religion." *Miller*, 728 P.2d at 797; *see also Little v. Wuerl*, 929 F.2d 944 (3rd Cir. 1991).

Parker misconstrues the affirmative action statement contained in St. Labre's Manual, which discourages discrimination in the workplace and encourages the implementation of policies consistent with Federal and State law. Even though St. Labre complies with Federal and State law, such compliance does not obliterate well established case law based upon Federal and State constitutional guarantees that hold that civil courts are prevented from interfering with the internal ecclesiastical workings and disciplines of a religious body.

Parker also argues that a distinction exists between ministerial and non-ministerial employees in this context, which required the Montana Supreme Court to make a determination regarding whether or not Parker was a ministerial employee, before affirming the District Court ruling. St. Labre disagrees. The religious Freedom Restoration Act of 1993, reinstated the compelling interest test found in *Yoder*. 42 U.S.C. § 2000bb, *et seq.* (Supp. V. 1993). In *EEOC v. Catholic University of America*, 83 F.3d 455, 462 (D.C. Cir. 1996), the District of Columbia Court of Appeals found that the ministerial exception survived *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990). However, the Court of Appeals further found that the ministerial exception was "not invoked to protect the freedom

of an individual to observe a particular command or practice of his church. Rather, it is designed to protect the freedom of the church to select those who will carry out its religious mission." Whether a ministerial or non-ministerial employee, Parker cites no authority to defeat the proposition that civil courts should not delve into, or make inquiry into, the inner ecclesiastical workings and affairs of the church.

The Montana Supreme Court's decision does not bestow charitable immunity upon any particular faith or theology, as Parker suggests. Rather, the decision preserves the institution's right to freely exercise its religion, whether it be Mormon, Jewish, Baptist, Roman Catholic or some other faith, as guaranteed by the First Amendment of the United States Constitution.

Parker cites no authority to support her contention that an employee's right to be free from discrimination is an overriding governmental interest sufficient to override the free exercise of religion clauses of the United States and Montana Constitutions. Rather, maintaining a "hands-off" policy with regards to ecclesiastical matters does not promote the Catholic religion, as Parker suggests. It merely preserves the freedom of exercise of religion clauses of the United States and Montana Constitutions. To hold otherwise would necessarily create excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. at 612-13.

CONCLUSION

For the foregoing reasons the Court should deny the Writ of Certiorari to the Montana Supreme Court.

Respectfully submitted,

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